No. 82-1988

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender of Douglas County, Oregon, and GARY BABCOCK, Public Defender of the State of Oregon,

Petitioners,

v.

BILLY IRL GLOVER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether 42 U.S.C. § 1983 authorizes a convicted person to assert a claim for damages against the public defenders who represented him at his criminal trial and appeal, on a theory that the public defenders deprived him of his constitutional rights pursuant to a conspiracy with state judges and administrative officials.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported as *Glover v. Tower*, 700 F.2d 556 (1983). In its opinion and ensuing judgment, the Court of Appeals affirmed in part, reversed in part, and remanded the judgment of the United States District Court for the District of Oregon, which had dismissed respondent (then plaintiff) Glover's civil rights action for failure to state a claim. The opinion of the Ninth Circuit Court of Appeals is included at Joint Appendix 41. The unreported order of the United States District Court for the District of Oregon is included at Joint Appendix 36.

JURISDICTION

Jurisdiction to review the Court of Appeals judgment by writ of certiorari in this civil case is conferred upon this Court by 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Ninth Circuit was dated and filed on March 1, 1983. The judgment sought to be reviewed was entered on the same date. The petition for a writ of certiorari was filed on May 31, 1983, within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rules 20 and 28(1) of

the Court. An order granting the petition for a writ of certiorari was issued by this Court on October 3, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Resolution of the issue presented in this case principally involves the Sixth and Fourteenth Amendments to the United States Constitution, and the federal statute authorizing civil actions for deprivation of rights, 42 U.S.C. § 1983.

United States Constitution, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence [sic]."

United States Constitution, Amendment XIV provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

State statutes establish the offices of the petitioner public defenders in this case. In Oregon the Office of County Public Defender is described in Oregon Revised Statutes [hereinafter Or. Rev. Stat.] §§ 151.010 - 151.090. The Office of State Public Defender is delineated in Or. Rev. Stat. §§ 151.210 - 151.290. These laws are set out in the Appendix to the brief.[1]

STATEMENT OF THE CASE

1. Summary of Facts

While incarcerated in the Oregon State Penitentiary, respondent Glover filed an action under 42 U.S.C. § 1983 against Douglas County Public Defender Bruce Tower and Oregon State Public Defender Gary Babcock. (J.A. 3). Glover's *pro se* complaint was made on a form provided by the United States District Court for the District of Oregon. (J.A. 2). Glover complains of an alleged

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[1]Or. Rev. Stat. §§ 151.010 - 151.290 are set out as they appear in the 1981 compilation of Oregon statutory law. The 1983 Oregon Legislature made minor amendments to Or. Rev. Stat. § 151.040, 151.230 and 151.280. A misreference to Or. Rev. Stat. § 1.51.010(3) in Or. Rev. Stat. § 151.040(1) was corrected to refer to Or. Rev. Stat. § 151.010(2). The minor amendments to Or. Rev. Stat. § 151.230 and 151.280 are inconsequential and not pertinent to this Court's review. The 1983 amendments have not yet been printed in the official compilation.

"conspiracy by state officials acting under a color of state authority to deprive [him] of his civil rights * * *." (J.A. 2-10). The gist of Glover's complaint is that his public defenders at trial and on appeal violated his constitutional rights by engaging in a far-flung and facially bizarre conspiracy with trial judges, a judge of the Oregon Court of Appeals, and named and unnamed state administrative officials to secure and to sustain his conviction on a felony charge brought by the State of Oregon. (J.A. 8-9).

Glover alleges that his trial attorney, petitioner Tower, a county public defender, conspired with state trial court judges to deprive Glover of his liberty by refusing to discharge the responsibilities and obligations of a court-appointed defense counsel. (J.A. 5). Tower allegedly conspired with state officials to prevent Glover from presenting a defense of mental disease or defect in his criminal prosecution. (J.A. 6). Glover also claims that Tower, by refusing to withdraw from the case, participated in a conspiracy to deprive Glover of his right to defend himself. (J.A. 7).

Glover alleges that petitioner Babcock, the state public defender, deliberately deprived him of a fair and adequate state court appeal of his criminal conviction. (J.A. 8).[2] Glover maintains that Babcock

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[2]The Oregon Court of Appeals decision in the matter giving rise to this controversy is reported as *State v. Glover*, 32 Or. App. 177, 573 P.2d 780 (1978) (summary affirmance of conviction "from the bench").

refused to obtain printed portions of the trial record, prepared an inadequate opening brief, and refused to correct the brief upon Glover's request. (J.A. 8). Glover alleges that pursuant to a conspiracy, public defender Babcock, like public defender Tower, knowingly and deliberately deprived him of his basic civil rights to defend himself against serious criminal charges. (J.A. 9).

Glover also alleges that members of the judicial and executive branches of Oregon government participated in the conspiracy against him. He claims that "state agents" not only persuaded petitioner Tower to do nothing to prepare for Glover's defense, but that they also persuaded trial court judges to ignore his requests for redress. (J.A. 6-7).

Glover maintains that the purpose of the conspiracy was to prevent him from disclosing dishonest actions by state officials. (J.A. 8-9). The alleged mastermind of the conspiracy was a former Oregon Attorney General who, in his capacity as a court of appeals judge, placed himself on the panel that reviewed Glover's criminal appeal. (J.A. 9). In his complaint, Glover prays for no compensatory damages. He seeks $5 million in punitive damages from public defender Tower and the same amount from public defender Babcock. (J.A. 5).

2. Procedural History

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, petitioner public defenders Tower and Babcock moved for dismissal of Glover's complaint on the ground that it failed to state a claim upon which relief could be granted. (J.A. 11). In the memorandum supporting their dismissal motion, Tower and Babcock maintained that Glover's purported § 1983 action against them should be dismissed because, as public defenders, they were absolutely immune from liability under § 1983 for acts performed in representing a defendant in a criminal prosecution. (J.A. 12). Tower and Babcock expressly relied upon the opinion of the Ninth Circuit Court of Appeals in *Miller v. Barilla*, 549 F.2d 648, 649 (1977), in which the court held "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in performance of his judicial functions as a public defender." (J.A. 12).

The United States District Court for the District of Oregon entered an order granting petitioners' motion to dismiss. (J.A. 36-38). Citing *Miller v. Barilla*, the District Court ruled in its unreported order that "* * * plaintiff has not stated a claim under 42 U.S.C. § 1983 because public defenders are absolutely immune from liability for acts done in the performance of their judicial function." (J.A. 37). Thereupon, the District Court entered a judg-

ment dismissing Glover's action. (J.A. 39). Glover appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the portion of the District Court's order which had ruled that public defenders Tower and Babcock were immune from liability under § 1983. The Court of Appeals reasoned that its precedent in *Miller v. Barilla* was no longer good law in light of this Court's subsequent decision in *Ferri v. Ackerman*, 444 U.S. 193 (1979). The Ninth Circuit panel concluded "that *Miller* cannot survive the rationale of *Ferri*," and that "*Ferri* and *Polk County v. Dodson*, [454 U.S. 312 (1981)], are inconsistent in principle with any immunity, qualified or absolute, of public defenders charged with conspiring with state officials in violation of 42 U.S.C. § 1983." *Glover v. Tower*, 700 F.2d at 558, 559. (J.A. 44, 45-46).

This Court granted certiorari to review the Ninth Circuit decision, which is in conflict with the decision of the Court of Appeals for the Third Circuit on the issue of public defender immunity from § 1983 liability in *Black v. Bayer*, 672 F.2d 309 (1982).

SUMMARY OF ARGUMENT

Respondent Glover asserts in his § 1983 complaint that his public defenders, pursuant to a conspiracy with state judges and administrative officials, deprived him of his constitutional rights

during his state criminal prosecution. Public defenders who represent indigent criminal defendants like Glover at trial and on appeal are absolutely immune from liability for damages under § 1983. A rule of absolute immunity for public defenders acting under color of state law by virtue of an alleged conspiracy with state officials is consistent with the legislative history of § 1983. In enacting the Ku Klux Klan Act of 1871, Congress sought to provide an effective means of redress for blacks subjected to vigilante terrorism. The Act provided a remedy for victims of crime when state courts and prosecutors were loathe to seek and impose criminal punishment. There is no basis to assume that Congress would have intended to deprive public defenders who are sued by convicted clients of defenses rooted in common law and the policy to protect the unfettered discharge of their functions.

Although public defender offices did not exist during the nineteenth century, a rule of absolute immunity for public defenders finds roots in the common law at the time 42 U.S.C. § 1983 was enacted. The common law provided immunity from liability in defamation suits for attorneys involved in judicial proceedings. One of the policies served by that immunity was the assurance that counsel could act without intimidation during the judicial process.

The recognition that judges and prosecutors must be free to act without intimidation has prompted this Court to recognize that § 1983 does not authorize damage claims against them for acts in the performance of their respective roles in criminal proceedings. Many of the considerations that have prompted recognition of judicial and prosecutorial immunity, such as to insure that these officials may act without intimidation, apply to public defenders whose responsibility is to provide constitutionally mandated legal assistance to indigent criminal defendants as part of a legislatively or judicially established program in or for a particular jurisdiction.

Moreover, many of the judgments which a public defender must make are functionally comparable to the judgments made by prosecutors and judges. This court has recognized that judges and prosecutors must have absolute immunity from § 1983 suits so that they will have the freedom necessary to make impartial judgments. Public defenders must also have absolute immunity to give them the freedom to make impartial judgments for the good of their clients, the judicial process and society.

Absolute immunity for public defenders is required to prevent overburdening the judicial system and to enable the states to fulfill their responsibility to provide effective assistance of counsel to indigent

criminal defendants. Public defender programs have been created as a response to a tremendous increase in the demand for proficient defense attorneys to assist indigent persons charged with crimes. Public defender programs have been instituted by state courts and legislatures precisely because community responsibility for providing defense services must be discharged with limited government resources. The court below acknowledged that its refusal to extend § 1983 immunity to public defenders would burden already overburdened public defender programs. Because these programs have an important bearing on the effectiveness of the judicial process in providing counsel to indigent criminal defendants, exposure of public defenders to § 1983 liability will burden the judicial process.

Allowing indigent criminal defendants to sue their public defenders under § 1983 will overburden the judicial process in two ways. It will overburden the federal judiciary because it will result in a flood of frivolous lawsuits by disgruntled indigent defendants, many of which will be brought *pro se*. Allowing indigent criminal defendants to sue their public defenders will overburden the state criminal justice systems because the public defenders' time, attention and limited resources will be diverted from effective defense of their clients. Ineffective representation of indigent criminal defendants will result

in slower judicial resolution of criminal cases both at trial and on appeal.

Qualified immunity for public defenders will not prevent a flood of meritless litigation and will do nothing to alleviate the burden such litigation will create for the judiciary and public defenders. It is the litigation itself more than the threat that a public defender ultimately may be found liable under § 1983 which causes the greater damage because the litigation forces the reallocation of scarce, fixed resources. The absence of absolute immunity will inhibit the ability of public defenders effectively to represent their clients and to contribute to the state judicial process.

Allowing indigent criminal defendants to sue their public defenders under § 1983 creates a conflict of constitutional dimension. Indigent criminal defendants have the right to effective assistance of counsel in state criminal prosecutions under the Sixth and Fourteenth Amendments. The exposure of public defenders to § 1983 lawsuits with the attendant diversion of their attention, time and resources necessarily will impede their ability to provide quality defense services to their indigent clients, and will frustrate states' efforts to comply with the commands of the Sixth and Fourteenth Amendments through public defender programs.

Finally, recognition of a rule of absolute immunity for public defenders from liability for damages under § 1983 would not leave the represented criminal defendant without a remedy for a public defender's negligent or wrongful acts or omissions. The defendant has access to myriad state and federal post-conviction remedies to correct ineffective assistance of defense counsel. Public defender misconduct may be remedied by resort to state tort actions, federal criminal proceedings, or state bar disciplinary proceedings. Existence of other means to correct and prevent constitutional abuse by public defenders undermines any argument that a federal § 1983 tort action for damages is the only way to insure that clients will not suffer constitutional violations at the hands of their public defenders.

In short, statutory history and pertinent policies support recognition of absolute immunity for the public defenders sued under § 1983 in this case.

ARGUMENT

In this suit for damages under 42 U.S.C. § 1983, the Court of Appeals for the Ninth Circuit erroneously held that petitioner public defenders were neither absolutely nor qualifiedly immune from liability to a former client who alleged that petitioners had conspired with state officials to deprive him of his constitutional rights while representing him

in a criminal prosecution.[3] The court reached this conclusion "with some reluctance" because it was aware that its decision might place a burden "on already burdened public defender's offices." *Glover v. Tower*, 700 F.2d at 559. Nevertheless, the court felt compelled by this Court's decisions in *Ferri v. Ackerman*, 444 U.S. 193 (1979) and *Polk County v. Dodson*, 454 U.S. 312 (1981) to reverse the District Court's dismissal of the *pro se* complaint filed by the then-incarcerated plaintiff, respondent Glover.

The Court of Appeals analysis is fundamentally flawed. The decision in *Ferri v. Ackerman* did not deal with the scope of a federal cause of action under 42 U.S.C. § 1983. *Ferri* held that the Criminal Justice Act of 1964 did not establish a federal immunity for federal court-appointed counsel that would preempt the maintenance of a state malpractice action. In *Polk County v. Dodson*, 454 U.S. at 317 n. 4, this Court did not reach the question whether a public defender is entitled to the same absolute immunity from damages under § 1983 as judges and prosecutors; the Court held that a public

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[3]Glover's complaint is indicative of how a disgruntled client could hale a state public defender into federal court under the purported auspices of § 1983 to litigate issues of ineffective assistance of counsel. Although Glover couched his complaint in the metaphor of conspiracy, he essentially alleged that his trial counsel, county public defender Tower, failed adequately to investigate and present evidence of the defense of mental disease or defect. (J.A. 6). Glover also alleged that Tower deprived him of his right to represent himself by refusing to withdraw from the case. (J.A. 7). Glover's appellate counsel, state public defender Babcock, allegedly failed to obtain the entire trial court record, prepared an inadequate appellate brief, and refused to correct the brief when Glover requested him to revise it. (J.A. 8).

defender does not act under color of state law for the purposes of § 1983 when performing the traditional functions of counsel to a criminal defendant. 454 U.S. at 325.

In the present case, however, the conspiracy allegations of the complaint cast the color of state law over the actions of the public defenders. *Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980). Thus, this case squarely presents the issue which this Court reserved in *Polk County*. The Court of Appeals failed to analyze the public defenders' claim of immunity in light of the pertinent statutory history, the common law history of relevant immunities, and the policies underlying those immunities. The Court of Appeals failed to look beyond the role public defenders principally perform in representing their clients and refused to recognize that public defenders also play another special role in the administration of justice. Due consideration of these factors compels the conclusion that § 1983 does not authorize the damages suit brought by Glover.

I. A rule of absolute immunity of public defenders from Section 1983 damages liability is consistent with the purpose and legislative history of the statute and is mandated by applicable common law principles.

A. *The legislative history of Section 1983 demonstrates that Congress did not intend to restrict the*

application of common law defenses in actions brought by persons who claim that they were wrongfully convicted of crimes as a result of a violation of their constitutional rights.

The question of immunity under § 1983 is essentially a matter of statutory construction. *See Owen v. City of Independence*, 445 U.S. 622, 635 (1980). In enacting the law, Congress intended to create a species of tort liability in favor of persons deprived of rights secured by the Constitution and federal laws. *Monroe v. Pape*, 365 U.S. 167, 180, 183 (1961), *overruled on other grounds*, *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978); *Carey v. Piphus*, 435 U.S. 247, 253 (1978). The terms of the enactment do not suggest qualifications on the maintenance of the right of action it establishes. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). However, this Court's decision in *Tenney v. Brandhove*, 341 U.S. 367 (1951), "established that § 1983 is to be read in harmony with the general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. at 418. Therefore, in the absence of congressional guidance, § 1983 must be read in the context of established common law tort principles and policies. The extent to which a public defender acting under color of state law is amenable to a § 1983 damage action depends upon a principled

examination of the immunities traditionally afforded similarly situated individuals and the present-day significance of the public interests which those principles of immunity promote. *See Imbler*, 424 U.S. at 421.

The historical context of the enactment of § 1 of the Ku Klux Klan Act of 1871, 17 Stat. 13, is the touchstone for the Court's inquiry into the field of common-law tort defenses and the public interests which they reflect.

> "It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

Although public defenders such as petitioners did not exist in 1871,[4] the legislative background of the

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[4]The initial public defender program in the United States was not established until 1914. Mounts, *Public Defender Programs, Professional Responsibility and Competent Representation*, 1982 Wis. L. Rev. 473, 476. The State of Connecticut instituted the first state public defender system in 1917. *See State v. Hudson*, 154 Conn. 631, 635, 228 A.2d 132 (1967). Ninety years after the enactment of 42 U.S.C. § 1983, and two years before the Court established an indigent felony defendant's right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), public defender offices served only three percent of the counties in the United States. Mounts, *supra*, 1982 Wis. L. Rev. at 476. By 1973, however, public defender programs were in operation in 28 percent of the nation's counties and served two-thirds of the population. *Id.* at 481 n. 10; Benner & Neary, *The Other Face of Justice* 72 (1973).

Civil Rights Act of 1871 provides insights that permit an educated analysis of the probable response of the 42nd Congress to the question of a public defender's immunity from damages in an action brought by a convicted client pursuant to the statute. *See* Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 64 (1980). These perspectives suggest that Congress would have intended to extend immunity to public defenders.

The overriding impetus for the enactment of 42 U.S.C. § 1983 was the unpunished exercise of vigilante terrorism against the newly freed blacks and their sympathizers in the post-Civil War South. *See Briscoe v. Lahue*, ___ U.S. ___, 103 S. Ct. 1108, 1116-1117 (1983). The Civil Rights Act of 1871 had three major purposes. One was to provide a federal remedy where state law was inadequate to the task. Another broader goal was to provide a remedy when state court enforcement was available in theory but denied as a result of the disinclination of state officials to exercise their authority to prevent or punish the wrongdoing of the Klan. *Monroe v. Pape*, 365 U.S. at 173-175.[5] Thus, the historical objective of the enactment was not to pave an avenue of redress for individuals who were convicted in state

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[5]The third aim, not relevant here, was to override certain state laws. *See Monroe v. Pape*, 365 U.S. at 173.

courts by wrongful means, but rather to provide an alternative remedy when the state courts and prosecutors were loathe to seek and to impose criminal punishment.

The plaintiff in this case seeks $10 million in punitive damages based on a claim that he stands convicted of a crime as the result of a conspiracy to deprive him of an adequate defense at his state trial and on appeal. An analogy to plaintiff's charges of conspiracy exists in the claim of an individual that he or she was convicted on the basis of perjured testimony pursuant to collusion between a state agent, such as a prosecutor, and a witness. This Court previously stated, however, that the history of the Act:

> "* * * does not * * * tend to show that Congress intended to abrogate witness immunity in civil actions under § 1, which applied to wrongs committed 'under color of law.' The bill's proponents were exclusively concerned with perjury resulting in unjust *acquittals*—perjury likely to be committed by private parties acting in furtherance of a conspiracy—and not with perjury committed 'under color of law' that might lead to unjust *convictions*. In hundreds of pages of debate there is no reference to the type of alleged constitutional deprivation at issue in this case: perjury by a *government official* leading to an unjust conviction." *Briscoe v. Lahue*, 103 S. Ct. at 1118. (Emphasis in original.)

The legislative history contains no significant indication that Congress specifically designed § 1983

as a remedial device to secure money damages for unjust convictions. There is no basis therefore to assume that Congress would have intended to deprive public defenders who are sued by convicted clients of defenses which find their roots in case law and in the policy of protecting the unrestricted discharge of their functions.

B. *A rule of absolute immunity of public defenders from damages under Section 1983 for actions taken while representing an indigent defendant has substantial foundation in common law.*

Although public defenders offices did not exist in 1871, a rule of public defender immunity would have its roots in a common law privilege applicable to counsel for a party in legal proceedings. If lawyers had practiced as public defenders during the nineteenth century, they would have been accorded absolute immunity at common law from suits for defamatory remarks made by them or their witnesses during judicial proceedings if the remarks were relevant to the matter. *Imbler v. Pachtman*, 424 U.S. at 426 n. 23; 424 U.S. at 439 (White, J., concurring in judgment). This privilege was extended to all counsel in a case and extended to lawyers' statements in pleadings and briefs. 424 U.S. at 426 n. 23. The substantial policy underlying this immunity was the protection of the judicial process in accurately resolving factual disputes in criminal and

civil cases. The specific protective purpose of the immunity from defamation suits was to avoid the risk that counsel would engage in self-censorship during the proceeding due to fear of subsequent defamation suits. 424 U.S. at 439-440 (White, J., concurring in judgment). At common law, a defender would have shared this absolute immunity from defamation suits with his or her prosecutorial counterpart. With regard to prosecutors, this common law immunity and immunity from suit for malicious prosecution have been extended to form the basis for the rule that prosecutors are absolutely immune from § 1983 liability for all prosecutorial conduct that is "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Public defenders should have the same protection from intimidation in performing their role in the judicial process.

In *Imbler v. Pachtman*, this Court held that a prosecutor is immune from § 1983 liability for his or her acts in initiating and presenting the state's case. 424 U.S. at 431. The Court determined that a rule of prosecutorial immunity would serve the policies that formed the basis for the common law immunity of judges. Harassment by unfounded litigation would cause distraction from official duties and inhibition of the required independence of judgment. 424 U.S. at 422-423, 424. Substantially equivalent

concerns prompted the recognition of a rule of absolute immunity from defamation liability for counsel in judicial proceedings.

Petitioners acknowledge that in *Branti v. Finkel*, 445 U.S. 507, 519 (1980), this Court restated the principle of *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979), that the primary responsibility of criminal defense counsel is to serve the interests of the client. The Court in *Branti* contrasted this responsibility of a public defender with the "broader public responsibilities of an official such as a prosecutor." *Branti v. Finkel*, 445 U.S. at 519 n. 7. Petitioners also acknowledge that in holding that public defenders generally do not act under color of state law for the purposes of § 1983, this Court drew the same distinction. In *Polk County v. Dodson*, the Court quoted from *Ferri v. Ackerman*, and concluded that the responsibility of a public defender to advance the undivided interests of his client was essentially a private function. *Polk County v. Dodson*, 454 U.S. 312, 318-319 & n. 8.

Notwithstanding this Court's statements about the respective roles of public defenders and judicial officers, public defenders are entitled to quasi-judicial immunity. The judgments which public defenders are required to make are functionally comparable to those made by judges and prosecutors. This Court stated in *Butz v. Economou*, 438 U.S.

478, 511-512 (1978), *quoting Imbler v. Pachtman*, 424 U.S. at 423 n. 20:

> "Judges have absolute immunity not because of their particular location within the Government but *because of the special nature of their responsibilities.* This point is underscored by the fact that prosecutors—themselves members of the Executive Branch—are also absolutely immune. 'It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well.'" (Emphasis added).

The prosecutor must determine, on the basis of the information available to him in each case, whether to charge an accused, which of alternative charges can be proved and should be punished, the extent of his office's resources which must be invested in order to successfully prosecute the case, and whether the probable result is worth the cost.

> "* * * Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Imbler v. Pachtman*, 424 U.S. at 425-426.

In preparing and presenting the defense case for trial or appeal, the public defender carries out his or her primary function to render effective assistance

of counsel to the defendant by reviewing information, investigating factual questions, researching legal issues, and making legal judgments. The public defender, however, has other responsibilities of a "special nature." *See Butz v. Economou*, 438 U.S. at 512. In addition to making judgments limited to the circumstances of his client's case, the defender, like the prosecutor, must make many institutional decisions under constraints of scarce resources, time, and information that, in the words of *Imbler*, "* * * could engender colorable claims of constitutional deprivation." 424 U.S. at 425. The defender's decision whether, and how thoroughly, to undertake independent investigation of a case will influence the quality of the particular client's representation. The defender, however, must also consider the fact that committing finite investigatory resources to that client's case will necessarily reduce the means available to meet the needs of other clients who have an equal right to effective representation. The public defender, like the prosecutor, must exercise discretion in establishing case priorities; allocating resources to each case according to the seriousness of the offense; assessing the likelihood of success; and determining whether the case presents circumstances that will require additional hearings or other procedures. Therefore, the public defender, who must appear and defend a

substantial percentage of "the hundreds of indictments and trials" for which the prosecutor has an equal responsibility, *Imbler v. Pachtman*, 424 U.S. at 425-426, performs equivalent judgmental functions.

In discharging the responsibility to provide the bulk of indigent defense services in a particular locale or jurisdiction, "[p]ublic defenders are typically required to cope with extremely heavy caseloads * * *." *Black v. Bayer*, 672 F.2d 309, 319 (3d Cir. 1982). The existence of the responsibility for heavy caseloads requires public defenders "* * * to decline to press the frivolous, to assign priorities between indigent criminal defendants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Black v. Bayer*, 672 F.2d at 319, *quoting Minns v. Paul*, 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977). The judgments which a public defender is required to make distinguish the defender from private retained counsel, *see Minns v. Paul*, 542 F.2d at 901-902, and are substantially equivalent to exercises of judicial and prosecutorial discretion. These judgments are sufficiently "judicial" in nature to satisfy the functional comparability test for according absolute immunity under § 1983.

II. Absolute immunity for public defenders is required to prevent overburdening the judicial system and to enable the states to fulfill their responsibility to provide effective assistance of counsel to indigent criminal defendants.

In deciding that prosecutors are absolutely immune from § 1983 liability, this Court in *Imbler v. Pachtman* not only looked to applicable common law immunity but also extended and shaped the contours of that immunity to serve the underlying policies in the context of present-day practice. Similar considerations compel recognition of public defender immunity from § 1983 liability.

Federal court consideration of broad-gauged claims like Glover's will seriously burden federal courts and public defenders with the costly task of proceeding through summary judgment on large numbers of inevitably meritless claims. Scarce, fixed resources of the public defender will be diverted to such claims at the direct expense of the quality of individual indigent defense. A further result of a rule—including a grant of qualified immunity—that allows these cases to proceed beyond summary dismissal on the basis of absolute immunity would constrain seriously the professional discretion of the public defender in handling both an overall caseload and individual cases. This Court has highly valued full and free exercise of professional discretion. The interests of the public, the judiciary, the public

defender, and the body of indigent criminal defendants will all be well served by a rule of absolute immunity.

A. *Glover's claim is emblematic of a wide range of frivolous Section 1983 suits which will consume the time and energy of an already overburdened criminal justice system under a rule of no absolute immunity.*

In *Polk County*, Justice Powell candidly acknowledged "the recent burgeoning of post-conviction remedies [that] has undoubtedly subjected the legal system to unprecedented strains * * *." 454 U.S. at 324. In 1980 alone, state prisoners brought 12,397 civil rights actions against public officials in the federal courts. This was a 10.7 percent increase over the previous year and represented a staggering 511 percent increase over the 2,030 filings only ten years before.[6] State prisoners filed 24,975 civil petitions in federal courts in 1982. 1982 Annual Report of the Director of the Administrative Office of the United States Courts 102. The most significant increase in state prisoner civil litigation was in prisoner civil rights petitions, up 7.0 percent in just one year. *Ibid.*

According to a major study, 65 percent of all felony charges and 47 percent of all misdemeanor charges are brought against indigent defendants.

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[6]1980 Annual Report of Administrative Office of the United States Courts 231-232; 1975 Annual Report of the Director of the Administrative Office of the United States Courts 207-209.

Benner & Neary, *supra*, note 3, at Table 117. Last year, over 12 million state criminal cases were charged. *See Michigan v. Long*, ___ U.S. ___, 103 S. Ct. 3469, 3477 fn. 8 (1983). The right to appointed counsel at government expense now extends to a broad range of circumstances, all of which would be subject to § 1983 claims for public defender conspiracies unless immunity is extended.[7]

Indigent criminal defendants commonly perceive the public defender to be an arm of the legal system which is prosecuting them. *E.g.*, Casper, *Did You Have a Lawyer When You Went to Court: No, I Had a Public Defender*, 1 Yale Rev. L. & Soc. Action 4, 6 (1970). Indigent criminal defendants often believe they were afforded second class representation. *See, e.g.*, Lefstein for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Criminal Defense Services for the Poor*, 50 (May 1982).

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[7]Indigents are presently entitled to representation in felonies, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and in misdemeanor cases, *compare Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to appointed counsel in misdemeanor cases involving a loss of liberty) *with Scott v. Illinois*, 440 U.S. 367 (1979) (no right to appointed counsel in misdemeanor case where only a fine is imposed). There is also a right to counsel in juvenile proceedings that result in confinement, *In re Gault*, 387 U.S. 1 (1967); in first appeals of right, *compare Douglas v. California*, 372 U.S. 353 (1963) (right to appointed counsel on first appeal of right) *with Ross v. Moffitt*, 417 U.S. 600 (1974) (appointed counsel not constitutionally required other than on appeals of right); at post indictment lineups, *U.S. v. Wade*, 388 U.S. 218 (1967); at preliminary examinations, *Coleman v. Alabama*, 399 U.S. 1 (1970); probation or parole revocation proceedings, *Mempa v. Rhay*, 389 U.S. 128 (1967); and in civil commitments, *Specht v. Patterson*, 386 U.S. 605 (1967).

The convicted defendant is intimately familiar with the facts of his case and the strategy of the legal defense formulated and presented by his counsel. The absolute immunities of other participants in the process by which a defendant is convicted—the judges who presided over the accused's trial and appeal, *Stump v. Sparkman*, 435 U.S. 349 (1978), the prosecutor who brought and tried the case, *Imbler v. Pachtman*, and the witnesses who testified against the accused, *Briscoe v. Lahue*—leave the public defender as the sole target of the defendant's frustration with his conviction. *See Brown v. Joseph*, 463 F.2d 1046, 1049 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

This Court has already determined that the majority of claims against a public defender cannot be cast as suits for civil damages under 42 U.S.C. § 1983. *Polk County v. Dodson*. Yet this Court and other federal courts have aptly noted that the resentment of convicted criminals often blossoms into § 1983 litigation. *E.g., Imbler v. Pachtman*, 424 U.S. at 425; *Minns v. Paul*, 542 F.2d at 902. Without a rule of absolute immunity, the only vent for this frustration, in terms of federal litigation, would be the assertion of meritless conspiracy claims against the public defender.

Conspiracy claims are easy to allege. The vast bulk of litigants inevitably would attempt to circum-

vent *Polk County v. Dodson* by recharacterizing an ineffective assistance of counsel claim as a conspiracy. Glover's claims themselves—e.g., that Tower failed to investigate and present a defense of mental disease or defect, (J.A. 6) or that Babcock would not amend his brief, (J.A. 8) are indicative of the types of public defender actions which may be reconstituted as a conspiracy claim in a § 1983 action.[8]

Public defenders operate under severe pressures on their time and resources. Plea negotiations may be based on information obtained from the prosecutor without an opportunity for independent defense investigation. Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey & Analysis*, Am. Crim. L. Bull. 161, 176 (1974); Lefstein ABA Committee Study, *supra*, p. 27, at 46. Observers of the process note their belief that:

> "* * * because of the importance of obtaining relevant information and thereby performing effectively, the public defender must foster a cooperative relationship with the district attorney's office." Wice & Suwak, *id.*, at 176.

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[8]Failure to make a motion to suppress could readily be recharacterized as a tacit or covert agreement between the prosecutor and the public defender to expose the jury to inadmissible evidence. Failure to call all witnesses a plaintiff claims would have helped his case could be pleaded as a conspiracy between the public defender and the prosecutor to promote the plaintiff's conviction. Claimed inadequate assistance with a petition for habeas corpus could be recharacterized as a conspiracy between the public defender and the prison authorities to keep a plaintiff in jail. A conspiracy claim could be based on an allegation by the convicted defendant that he saw his attorney speak with a state judge in the courthouse before hearings. *See Shaffer v. Cook*, 634 F.2d 1259, 1260 (10th Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

The leap from cooperative to conspiratorial is not great for a disappointed convict.

Innovative and experimental attempts by public defenders to make the criminal justice system more responsive will be curtailed if public defenders are exposed to conspiracy claims. Experiments in expediting trials or appeals, for example, may be implemented to aid defendants; yet the overtones of conspiracy to a prospective § 1983 litigant would be music to a litigious ear.

The foregoing recitation of possible conspiracy claims plainly is not exhaustive. Indeed it is limited only by the inventiveness of prisoners who already file over 12,000 civil rights claims in federal courts annually. *See* 1980 Annual Report of Administrative Office of U.S. Courts, *supra* p. 26 , at 231-232.

As this Court has noted with respect to judges, witnesses, and prosecutors, the intense feelings and significant interests at stake in a criminal trial are likely to produce a losing party who will "accept anything but the soundness of the decision as explanation" of the outcome. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348 (1872). Claims such as Glover's will involve extensive efforts by the courts and the parties, amounting sometimes to a retrial of the core of the original prosecution. This predictable scenario defeats the judicial interest in the finality of judgments. *See Imbler v. Pachtman*, 424 U.S. at

423-427. This Court has repeatedly found, and recognized as important, that "this category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources * * *." *Briscoe v. Lahue*, 103 S.Ct. at 1120; *see also Imbler v. Pachtman*, 424 U.S. at 425.

The overwhelming majority of § 1983 claims like Glover's will be meritless. The Fourth Circuit has written in a case involving public defender liability that:

> "The experience of the federal courts in federal habeas corpus and § 1983 litigation demonstrates that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties." *Minns v. Paul*, 542 F.2d at 902. [9]

In addition to the expectation of a bulk of meritless claims, the federal courts must be prepared to extend to those claims the special solicitude which must be accorded *pro se* pleadings. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972).

Countenancing claims such as Glover's will require federal courts to engage in full summary judgment procedures. *Polk County v. Dodson*, 454 U.S. at 336 (Blackmun, J., dissenting); *Black v.*

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[9] *Accord*, Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 62 Corn. L. Rev. 482, 544 (1982). At least one commentator has suggested that the flood of baseless civil rights filings may hamper overworked federal courts in their endeavors to identify and preserve those cases which may have substantial merit. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 611 (1979).

Bayer, 672 F.2d at 316. Formal summary judgment procedure, *see* Fed. R. Civ. P. 56, may require the public defender to develop evidence and often undertake demanding discovery. In fact, the public defender will be compelled to establish the defense he would have to present at trial. Public defenders may be required under Rule 56 to present the federal district court with a frequently voluminous record and transcript of the state prosecution. Court and counsel would have to examine this record. In most jurisdictions, the expenses must be met by public resources; in some, the resources must be provided by the already sparse appropriations available to the judicial branch of government. Even this scenario, however, is an unreasonably conservative assessment of the burdens on the courts and the public defender. After *Polk County v. Dodson*, a disgruntled client must make additional or reconstituted allegations which require factual controversion by the public defender. Moreover, cases may degenerate into swearing matches or an examination of motive and mental state in which the granting of summary judgment is inappropriate. *See Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468, 473 (1962). The burden on the federal courts required to consider fairly a quantity of meritless claims is plainly an important factor which argues for a grant of immunity.

B. *A rule denying absolute immunity will adversely impact the public defender's ability to represent his clients effectively and will in turn negatively impact the state judicial system.*

Federal court consideration of claims like Glover's will divert the public defender's scarce resources away from effective criminal defense. If the public defender is not able to represent his client effectively because scarce resources have been diverted, the judicial system will suffer. Our discussion has emphasized the burden on the resources of the judicial system which suits such as respondent's will impose. The difficulties of an underfunded delivery system for indigent defense[10] also inhibit the provision of effective indigent defense.

Overwhelming caseloads present the most serious problem to underfunded public defenders. Public defender offices handle caseloads well in excess of generally accepted maximum caseload limits. *See e.g.*, Note, *Work Overload and Defender Burnout*, 35 NLADA Briefcase, 5, 7 (1977) caseloads often exceed recommended guidelines by 50 percent or

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[10]Funding for indigent defense is approaching crisis. *E.g.*, Lefstein ABA Committee Study, *supra*, p. 27, at 57. Only one and one-half percent of all funds for the state criminal justice systems—police, corrections, courts, prosecution, and indigent defense—go to indigent defense. In fiscal year 1978 funds were apportioned: Police 53.2 percent; corrections 24.7 percent; judiciary 13.1 percent; prosecution 5.9 percent. Bureau of Justice Statistics, U.S. Department of Justice, 1980 Source Book of Criminal Justice Statistics 11 (1981).

more). Voluminous literature on techniques of caseload management attests to the universal perception of the problem. *E.g.*, Ligda, *Defender Workloads: The Numbers Game*, 34 NLADA Briefcase 23-35 (1976). In Oregon in 1979 the state Public Defender Committee informed certain courts that the state appellate defender's office could no longer handle every appeal because its lawyers were seriously overburdened. *See State ex rel. Acocella v. Allen*, 288 Or. 175, 604 P.2d 391 (1979). The public defenders were handling 11.8 appeals per lawyer per month, 288 Or. at 177, n. 1, nearly six times the caseload recommended by the National Advisory Commission on Criminal Justice Standards and Goals, Standard 13.12 (maximum of 25 appeals per year suggested).

General case or trial preparation is hindered by the press of caseload and lack of funds. *E.g.*, Lefstein ABA Committee Study, *supra*, p. 27 at 35, 46. Lack of resources for functional or private office space, and inadequate secretarial and paralegal assistance affect the qualify of representation. *Id.* at 11, 12. The unavailability of investigators has a direct and major impact on the number of cases an attorney can handle. Benner & Neary, *supra*, note 3, at 29. Lack of resources for social workers can mean that alternative dispositions are not fully explored.

See generally, Lefstein ABA Committee Study, *supra*, p. 27 at 37.

Public defenders must be able to recruit and retain able public defenders. *Minns v. Paul*, 541 F.2d at 901; *Brown v. Joseph*, 463 F.2d 1046, 1049 (3d Cir. 1972). Low salaries of public defenders contribute to a pattern whereby able lawyers leave the public defender's office after two to three years. Benner & Neary, *supra*, note 3 at Table 20; Benner, Tokenism and the American Indigent: Some Prospectives on Defense Services, 12 Am. Crim. L. Rev. 667, 683 (1975). Exposure to personal liability or re-direction of systemic or personal resources to insurance or defense of claims will only aggravate a critical problem. Working conditions, caseload and lack of support staff already discourage attorneys from pursuing or continuing a career in public defender services. Lefstein ABA Committee Study, *supra*, p. 27 at 36.

Not only will exposure of public defenders to potential liability under § 1983 direct scarce resources away from effective defense but such expense will also constrict public defenders' ability to exercise their professional discretion.

> "Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted

> not only mistakenly but with malice and corruption." *Dennis v. Sparks*, 449 U.S. at 30.

The same policy of ensuring free exercise of independent judgment should apply with equal force to the integral actors who shape and present a case for the court to consider.

As discussed earlier, the Fourth Circuit Court of Appeals aptly stated the particular need for public defenders to retain:

> "the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Minns v. Paul*, 542 F.2d at 901.

Public defender discretion is circumscribed by heavy caseloads and state allocation of resources. *E.g.*, *Polk County*, 454 U.S. at 332 (Blackmun, J., dissenting); Note, *Liability of Public Defenders Under Section 1983: Robinson v. Bergstrom*, 92 Harv. L. Rev. 943, 947 (1979). Limited access to funds for important constituent elements of defense preparation, such as investigatorial services, hinders public defenders in case preparation. Public defenders should not be held liable in suits growing out of discretionary decisions based on institutional resource constraints.

If, as has been demonstrated above, public defenders are hindered by exposure to § 1983

liability in their ability to effectively represent the indigent accused, the state criminal justice system will suffer. The negative impact on the judicial system caused by ineffective representation of criminal defendants was noted in a recent national study of defense services for the poor:

> "Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented; other times, particularly in misdemeanor cases, no lawyer is provided or a constitutionally defective waiver of counsel is accepted by the court. Defendants suffer quite directly, *and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers.* There also are intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained." Lefstein ABA Committee Study, *supra*, p. 27 at 2. (Emphasis added).

The need to avert burdens on the judicial process prompted this Court to hold, in *Briscoe v. Lahue*, that § 1983 does not authorize a convicted state defendant to assert a claim for damages against a police officer for giving perjured testimony at the defendant's criminal trial. In that case, the Court acknowledged that the traditional reasons for witness immunity were less applicable to police officer witnesses. Nevertheless, the Court determined that "other considerations of public policy

support absolute immunity more emphatically for such persons than for ordinary witnesses." 103 S. Ct. at 1119.

The Court concluded that unless absolute immunity was extended to police officer witnesses their contributions to the judicial process and effective performance of their other public duties might be compromised. *Ibid.* After noting the probability that § 1983 lawsuits against police officer witnesses would be frequent, the Court said:

> "This category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources. As this Court noted when it recognized absolute immunity for prosecutors in *Imbler*, if the defendant official 'can be made to answer in court each time [a disgruntled defendant] charged him with wrongdoing, his energy and attention would be diverted from pressing duties of enforcing the criminal law.' 424 U.S. at 425." *Briscoe v. Lahue*, 103 S. Ct. at 1120.

The Court's analysis in *Briscoe* bears directly on the resolution of the issue in this case. Unless the Ninth Circuit's refusal of § 1983 absolute immunity is reversed, a tangible burden will be placed on this already over-burdened public legal resource. As in the case of the police witnesses in *Briscoe*, the contributions of public defenders Babcock and Tower to the Oregon judicial process and their effective performance of their other public duties will be undermined. The Oregon judicial process conse-

quently will be hampered in its attempts to carry out the constitutional mandate that indigent criminal defendants be provided with a lawyer to assist them in their defense. Moreover, because § 1983 lawsuits against public defenders, like lawsuits against prosecutors, can be expected with some frequency, *cf. Bradley v. Fisher*, 80 U.S. at 348, considerable amounts of judicial time and public defender energy will be diverted by frivolous litigation such as the § 1983 suit in this case.

The public defender unlike the appointed private criminal defense attorney performs an institutional role far beyond ad hoc advocacy for a particular accused. The volume of cases, the institutional relationship with prosecutors and courts, and the ability to view needs for systemic changes in the criminal justice process all affect the public defender with a unique capacity broadly to advocate the public interest through establishment of case and issue priorities. This institutional role permits the public defender to pursue legal strategies which benefit the class of indigent defendants far beyond the capacity of members of the private defense bar to whom this Court has not accorded immunity from suit. Experimentation in the states with better means of establishing public defender services will be halted if an immunity which recognizes this institutional law reform role is not conferred.

Because the imposition of potential § 1983 liability on already over-burdened public defender programs would impinge on the judicial process, absolute immunity for public defenders is required. The principles set forth in *Pierson v. Ray*, 386 U.S. 547 (1967) to protect judges and in *Imbler v. Pachtman* to protect prosecutors also apply to public defenders, who perform a somewhat different function in the judicial process but whose participation in bringing the litigation to a just—or possibly unjust—conclusion is equally indispensable. *Cf. Briscoe v. Lahue*, 103 S. Ct. at 1121. In other words, to afford petitioners Tower and Babcock anything less than absolute immunity from § 1983 damage liability in a case such as this, will disserve state and federal judicial processes.

C. *A grant of qualified immunity will do nothing to stem the tide of meritless, burdensome litigation. A grant of absolute immunity is required.*

A rule of absolute immunity should be recognized for Tower and Babcock in this case.[11] The interposition of qualified immunity fails utterly to discourage the institution of vexatious actions.

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[11]Tower, the county public defender, and Babcock, the state (appellate) public defender, are full-time providers of indigent services. Their compensation and resources are fixed by the government. *See* Appendix to this brief. The primary evil of suits as Glover's is the forced reallocation of critically scarce, fixed resources, away from indigent defense. The problem becomes manifest when an organization exists for the purpose of providing indigent defense and the volume of its work is such that its exposure to suit is great and the prospect and effect of reallocation of resources is real.

"* * * Although it is difficult to make much of these figures, the filings against police officers and prison officials are consistent with the notion that *the qualified immunity defense does not discourage harassing litigation.* The percentage of these suits [alleging constitutional violations] that are dismissed is quite high; nonetheless, the number that proceed to trial is significant, while the instances of liability judgments against defendants are negligible. It is possible that many meritorious claims are being dismissed for inartful pleading and that other meritorious claims are being denied after trial for failure to clear a too-high burden of persuasion. It is at least equally plausible, however, that because of frustration, lack of other means for relief of related grievances, pique, or simply antipathy for the defendant, *many nonmeritorious claims are being brought, consuming considerable judicial resources, entailing sizeable defense costs, yielding few damage awards, but perhaps discouraging some desirable official conduct.*" Cass, *Damage Suits Against Public Officers*, 129 Pa. L. Rev. 1110, 1159 (1981). (Emphasis added).

A rule of qualified immunity[12] imposes substan-

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[12]The Court has granted state and federal *executive* officers only a qualified good faith immunity. An official, upon showing that his challenged actions were not undertaken with an intent to cause injury and did not result in a constitutional violation of which he was or reasonably should have been aware, was deemed immune from damages. *Wood v. Strickland*, 420 U.S 308 (1975). The Court afforded qualified immunity on the assumption that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading." *Butz v. Economou*, 438 U.S. at 507. Experience, however, did not bear out this assumption and the Court, emphasizing the litigation costs of attempting, often unsuccessfully, pretrial determinations of an official's state of mind, abandoned the subjective prong of the *Wood* test for an objective inquiry as to whether the official's conduct violated established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 102 S. Ct. at 2737-2739. The same concerns which prompted the Court in *Harlow* to limit the scope of the qualified immunity inquiry require the grant of absolute immunity from § 1983 damage actions to public defenders.

tial and unavoidable costs on the parties and the judicial system. Such an immunity merely recognizes the existence of an affirmative defense which must be pleaded by the defendant. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Therefore, the recognition of a qualified immunity locks the courts and the public defender into the time and expense of the summary judgment process. The efficiency with which insubstantial lawsuits may be eliminated is a significant factor in the formulation of a rule of immunity. *Harlow v. Fitzgerald*, ___ U.S. ___, 102 S. Ct. 2727 (1982). The Third Circuit, in *Black v. Bayer*, determined that the costs and chilling effects of proceeding even to summary judgment weighed in favor of granting absolute damage immunity to public defenders. *See also Miller v. Barilla*, 549 F.2d 648, 649-650 (9th Cir. 1977), *overruled*, *Glover v. Tower*, 700 F.2d 556, 558-559 (9th Cir. 1983).

Qualified immunity may shield the public defender from ultimate liability in some cases, but it will not protect the public defender or the courts from the greater damage incurred by the forced reallocation of scarce, fixed resources to cope with a spate of meritless claims. The mass of indigent defendants requiring quality legal representation and adequate court consideration will ultimately suffer. A rule of absolute immunity is required to protect the inter-

ests of the court, the public defender, the public, and the body of indigent defendants.

D. *Allowing indigent criminal defendants to sue their public defenders under Section 1983 creates a conflict of constitutional dimensions.*

The judicial process must insure that an indigent criminal defendant's Sixth and Fourteenth Amendment right to effective assistance of counsel is protected in a state criminal prosecution. "There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Polk County*, 454 U.S. at 322. Public defender programs have been established as a measure for insuring that indigent criminal defendants are afforded effective legal assistance. State and local governments spent over $435 million in fiscal year 1980-1981 on indigent defense.[13]

Section 1983 suits based on alleged conspiracies in a system of indigent defense and designed to circumvent *Polk County*, present an ironic counterpoint to the historical roots of § 1983. The Ku Klux Klan Act of 1871, intended to ensure that federal constitutional rights were not violated by state officials without any accountability. Yet now a vast system of state mechanisms put in place to ensure vindication of federal constitutional rights is itself

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[13]Lefstein ABA Committee Study, *supra*, p. 27 at 10. The sum is based on figures from either fiscal years 1980 or 1981, depending on availability of data in each jurisdiction.

subject to masses of frivolous suits under § 1983. Inevitably this unimagined counterthrust reallocates the public defender's scarce resources and weakens its ability to protect the constitutional rights of those entrusted to its care.

Indeed, a conflict of constitutional dimension is created if disgruntled indigent defendants are authorized by § 1983 to bring federal actions for money damages against the public defenders who represent them. The exposure of a public defender to such lawsuits with the attendant diversion of the defender's attention, time and funding necessarily will interfere with and may well prevent the speedy and efficient performance of the defender's function. *Black v. Bayer*, 672 F.2d at 3109. Thus, one client's § 1983 lawsuit against his public defender threatens to compromise the constitutional rights of the defender's other clients to effective assistance of counsel. Congress simply could not have intended that such constitutional anomalies occur, particularly when, as discussed below, other remedies are available to indigent defendants and the public to remedy and sanction negligent or wrongful conduct by public defenders.

E. *A range of state and federal remedies other than Section 1983 protect an indigent defendant in the rare case of an actual constitutional deprivation.*

These remedies serve the policy underlying the enactment of the Civil Rights Act of 1871.

The costs to the body of indigent defendants of a grant of absolute immunity to the public defender are plainly low, if they exist at all. Empirical data discussed above has highlighted the predictably high rate of frivolous claims. Further, the cost of an immunity to be borne by the rare plaintiff with a well-founded conspiracy claim is offset by the availability of other potent means of redress.

In his complaint for damages under § 1983, Glover stated: "* * * your plaintiff's only redress is through civil action via Title 42 U.S. C. 1983." (J.A. 9). A key purpose of the Civil Rights Act of 1871 was to establish an avenue between wrongs committed under color of state law and the federal courts, *Monroe v. Pape*, 365 U.S. at 173-175. The Civil Rights Act of 1871 established the federal remedy to provide at least one salient remedy for deprivation of federally secured rights if state law or state law enforcement were inadequate to the task. *Ibid.* If, in fact, § 1983 were Glover's only remedy, a strong historical as well as policy reason would exist for hesitating to recognize an immunity that would effectively cut off his access to § 1983. The fact that Glover's claim is far from true undercuts any historical justification for countenancing his suit and demonstrates that the policies which led to the

establishment of § 1983 are being well and thoroughly served by other available state and federal remedies.

In the facially unlikely event that a public defender were to conspire with a public official to deprive an indigent defendant of his constitutional rights as alleged here, state legal systems provide extensive correctives to cure the violation. *Polk County v. Dodson*, 454 U.S. at 325 n 18. Glover had the right to direct appellate review of his conviction in the Oregon Court of Appeals. Or. Rev. Stat. § 138.040. The need to provide private damage actions to control unconstitutional conduct at a lower court level is reduced when the judicial process provides for correction of error on appeal. *Butz v. Economou*, 438 U.S. at 512; *see also Pierson v. Ray*, 386 U.S. 547, 554 (1967). Glover had the prerogative to seek discretionary review of the court of appeals decision in the Oregon Supreme Court. Or. Rev. Stat. § 2.520. Glover also could, and still can, invoke state post-conviction relief proceedings, Or. Rev. Stat. §§ 138.510 *et seq.*

Glover also had a federal habeas corpus remedy, 28 U.S.C. § 2254, to obtain review of his claim that he was victimized by his trial and appellate public defenders. *See Polk County v. Dodson*, 454 U.S. at 325 n. 18. A federal criminal statute, 18 U.S.C. §

242,[14] protects the societal interest in punishing and deterring unlawful or unethical conduct by the public defender. The statute has been applied to provide a remedy against a public defender who abuses his office and wilfully deprives a client of his constitutional rights.[15] As the court in *Imbler v. Pachtman* pointed out regarding prosecutors, a grant of immunity "does not leave the public powerless to deter misconduct or to punish that which occurs." 424 U.S. at 429. State bar disciplinary proceedings could also be instituted. *See*, 424 U.S. at 429. "These checks undermine the argument that the imposition of civil liability is the only way to insure that [public lawyers] are mindful of the constitutional rights of persons accused of crime." 424 U.S. at 429.

Even if it were the case that the type of relief rather than the nature of the wrong to be remedied were an important concern of Congress in enacting the Ku Klux Klan Act, *see Monroe v. Pape*, 365 U.S. at 183, *but see Whitman, supra*, p. 16 , at 21, Glover may have had a civil action for monetary damages in state tort law for malpractice which

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[14] 18 U.S.C. § 242 provides in pertinent part:

"Whoever, under color of any, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States * * * [is guilty of an offense.]"

[15] *United States v. Senak*, 447 F.2d 304 (7th Cir), *cert. denied*, 414 U.S. 856 (1973) (indictment of a county public defender charged with exacting fees from an indigent client and from friends and relatives of other indigent clients by threatening inadequate legal representation states an offense under 18 U.S.C. § 242).

alleviates the concern.[16]

Thus, in the improbable event that petitioner public defenders did conspire with state officials to deprive Glover of his constitutional rights, he would have avenues for redress even if his public defenders were absolutely immune from § 1983 damages liability. This factor reinforces the conclusion that public defenders should be granted absolute immunity from § 1983 damages liability. *Black v. Bayer*, 672 F.2d at 320; *see Barr v. Matteo*, 360 U.S. 564, 576 (1959).

CONCLUSION

The manifest public good of a grant of immunity from § 1983 liability for public defenders engaged in important efforts to vindicate federal constitutional rights far outweighs the effect of foreclosing one avenue of relief to claimants. The decision of the Court of Appeals, holding that public defenders have no immunity from a § 1983 suit, should be reversed. This case should be remanded with instructions that the Court of Appeals vacate its judgment and

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[16] No Oregon appellate case has discussed the liability of a public defender for damages in a malpractice action brought by a former client. Other states' courts have held that public defenders may be liable to their clients for malpractice damages. *Reese v. Danforth*, 486 Pa. 479, 406 A.2d 735 (1979); *Spring v. Constantino*, 168 Conn. 563, 362 A.2d 871 (1975); *Donigan v. Finn*, 95 Mich. App. 28, 290 N.W.2d 80 (1980).

reinstate the District Court's order and judgment dismissing Glover's complaint.

Respectfully submitted,
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COUNTY PUBLIC DEFENDER

151.010 Public defender services by county; termination. (1) The board of county commissioners of any county may provide county public defender services by:

(a) Contract with an attorney or group of attorneys; or

(b) Creation of an office of county public defender and appointment of a county public defender as provided in ORS 151.010 to 151.090.

(2) The board of county commissioners may at any time terminate the office of the county public defender.

(3) As used in ORS 151.010 to 151.090, "board of county commissioners" includes county court. [1971 c.432 §1; 1973 c.836 §311]

151.020 Status of county public defender and staff as county employes. The county public defender, his deputies and investigators, and other employes of the county public defender shall not be subject to civil service laws or be classified as county employes for purposes of the county retirement plan, unless the board of county commissioners specifically determines by order that they shall participate in the retirement plan. [1971 c.432 §2]

151.030 Private practice by defender or deputy prohibited in certain cases. Any county public defender and any deputy county public defender receiving a salary in excess of $13,000 per year shall not engage in a private practice of law. [1971 c.432 §3]

151.040 Term; qualification; employment by prosecution prohibited. (1) The term of office of the county public defender is four years, subject to the provisions of ORS 151.010 (3), and subject to removal from office for cause by the board of county commissioners.

(2) The county public defender shall be an active member of the Oregon State Bar in good standing.

(3) The county public defender shall take an oath of office to support the Constitution of the United States and the Constitution of the State of Oregon.

(4) The county public defender and his deputies shall not be employed in any capacity by the district attorney or other public prosecutor. [1971 c.432 §4]

151.050 Defender's staff; duties; office expenses paid by county. (1) Subject to limitations otherwise prescribed by law, when it is necessary to enable the public defender to perform his duties, the county public defender may, with the approval of the board of county commissioners:

(a) Employ one or more attorneys as deputies to exercise such powers, authority and duties of the public defender as he may assign to them;

(b) Employ other individuals, including expert investigators, expert witnesses and interpreters;

(c) Hire professional staff, assistance and clerical staff; and

(d) Do all those acts necessary and proper for the faithful performance of his duties.

(2) The county shall pay all necessary and proper expenses of the office of county public defender, including wages and salaries, in accordance with the county budget laws. This in no way restricts the county from contracting with or entering into agreements with other counties or subdivisions of the state, or with the State of Oregon, or with the United States Government or its agencies for payment of these expenses by agreement or contract as provided in ORS 151.090. [1971 c.432 §5]

151.060 Appointment to represent indigents by circuit and district courts; authority for appointment by federal and municipal courts. (1) The circuit or district court of the county for which he is county public defender shall have the power to appoint the county public defender in any proceeding in which, under ORS 135.050 or otherwise, the court has the power to appoint counsel to represent an indigent. A federal or municipal court may appoint the county public defender for a proceeding before it pursuant to an agreement under ORS 151.090.

(2) The county public defender may act as an attorney for an indigent at any stage of any criminal or other proceeding before any state or federal court or magistrate before which the county public defender or his designated deputy is admitted to practice.

(3) The county public defender may act only in any county for which he is county public defender or in a county in which occurs any stage, including judicial review, of a proceeding begun in a county for which he is public defender.

(4) Nothing in ORS 151.010 to 151.090 shall limit the power of any court to appoint counsel to represent an indigent as otherwise provided by law. [1971 c.432 §6]

151.070 Gifts and grants. Any county having a public defender may accept gifts, grants, donations, requests or devises to aid and promote the work of the county public defender, and the county public defender may cooperate with nonprofit organizations and government agencies that render legal aid within the county to persons without means to retain an attorney. [1971 c.432 §7]

151.080 Register of proceedings. The office of public defender shall maintain a register in which shall be kept a memorandum of each proceeding in which the county public defender serves in his official capacity, and the right to custody of the register shall pass to the county public defender's successor. [1971 c.432 §8]

151.090 Interagency agreements relating to services of defender. The provisions of ORS 190.003 to 190.110 shall apply to the powers granted counties by ORS 151.010 to 151.090. The county commissioners of a county with a public defender may also enter into a contract or agreement with the United States Government or any agency of the United States Government for provision of services by the county public defender, and the county may accept payment from the United States Government or agency for such services pursuant to such an agreement or contract. [1971 c.432 §9]

STATE CONTRACT FOR COUNSEL TO INDIGENTS

151.150 State Court Administrator may contract for provision of counsel to indigent persons. (1) The State Court Administrator, on behalf of the state, may contract with an attorney or group of attorneys for the provision by the attorney or group of attorneys of services as counsel for indigents in proceedings in which a court or magistrate has the power to appoint counsel to represent an indigent and the state is required to pay compensation for that representation. The State Court Administrator, on behalf of the state, and the governing body of a county having a county public defender as provided in ORS 151.010 to 151.090, on behalf of the county, may contract for the provision by the county public defender of services as counsel for indigents in those proceedings. The expense of services provided under a contract shall be paid by the state from funds available for the purpose.

(2) A court or magistrate may appoint an attorney or a county public defender under a contract with the state as provided in subsection (1) of this section to represent an indigent in any proceeding in which the court or magistrate has the power to appoint counsel to represent an indigent and the state is required to pay compensation for that representation.

(3) This section does not apply to proceedings in which the Public Defender established by ORS 151.280 is authorized, able and appointed to provide services as counsel for indigents. [1981 s.s. c.3 §117]

Note: 151.150 becomes operative January 1, 1983. See section 5, chapter 3, Oregon Laws 1981 (special session).

STATE PUBLIC DEFENDER

151.210 Definitions for ORS 151.220 to 151.280. As used in ORS 151.220 to 151.280, unless the context requires otherwise:

(1) "Committee" means the Public Defender Committee appointed under ORS 151.270.

(2) "Defender" means the Public Defender appointed under ORS 151.280. [Formerly 138.710]

151.220 Public Defender; term; qualifications; deputies. (1) The defender's term is four years, and he may be reappointed. The office of defender becomes vacant upon the conditions prescribed in ORS 236.010, upon the committee's finding of any of the causes enumerated in ORS 241.425 (1) to (3), or upon the defender's failure to comply with subsection (2) of this section.

(2) The defender shall be an active member of the Oregon State Bar.

(3) To qualify for office the individual appointed defender shall file with the Secretary of State his signed oath of office to the effect that he will support the Constitution of the United States and the Constitution of Oregon, and that he will faithfully and honestly demean himself in his office.

(4) The defender and his deputies shall be members of the exempt service established by ORS 240.200. One secretary for the defender shall be a member of the unclassified service.

(5) The defender, and any of his deputies who receive a salary of $10,000 per year or more, shall not engage in the private practice of law.

(6) The defender and his deputies shall not be employed in any capacity by a district attorney or other public prosecutor. [Formerly 138.740]

151.230 Salary and expenses. (1) The defender shall receive such annual salary as is provided by law. The defender shall receive the minimum salary unless such salary is or has been altered by the Public Defender Committee in the manner prescribed in ORS 292.855 (1975 Replacement Part).

(2) The defender shall be paid by the state in the same manner as other state officers are paid. Such salary shall be the full compensation to the defender for all his services, except for the allowance of his expense as a state officer. [Formerly 138.750]

151.240 Administrative powers of defender. (1) When it is necessary to enable the defender to perform his duties, the defender may:

(a) Employ deputies with the power and authority of the defender.

(b) Employ other individuals, including expert investigators, witnesses and interpreters.

(c) Contract for the purchase of materials or other services.

(d) Consult with and, in appropriate cases, join in the defense, any attorney who had previously represented the individual in a case which resulted in a conviction under consideration in the proceeding where the defender represents the individual. Any compensation paid such attorney for services rendered under this paragraph shall be paid solely as provided by ORS 138.490.

(e) Make or assist in making any study, survey or report upon the need for, use of and availability of legal aid to indigent persons in the State of Oregon, and accept payment therefor.

(2) Subject to the express approval of the committee, the defender may accept gifts, grants or services from, or contract with nonprofit organizations, educational institutions and other state or federal agencies; in rendering legal aid to persons without means to retain an attorney and in studying, surveying and reporting on the need, use and availability of such aid in the State of Oregon.

(3) Payment for materials and services procured under this section shall be made in the same manner as other state expenses are paid. [Formerly 138.760]

151.250 When defender may render services. (1) In accordance with subsections (2) to (4) of this section and the determinations of the committee under ORS 151.280 (2) or (7), the defender may act as attorney at any stage of a proceeding before any court, including the Supreme Court, for an individual who is committed to the legal and physical custody of the Corrections Division pursuant to ORS 137.124, and the proceeding is other than:

(a) A habeas corpus proceeding;

(b) A proceeding for which counsel is appointed under ORS 135.045, 135.050, 419.498 or 426.100; or

(c) A proceeding of contempt of court, criminal or civil.

(2) The defender may act only at the request of the individual described in subsection (1) of this section, or, if no such request is made, at the request of the court or magistrate.

(3) The individual on whose behalf the defender is requested to act shall submit to the defender, in the form prescribed by the committee, an affidavit of his financial circumstances.

(4) At the request of the defender or an individual who seeks the defender's aid, the court or magistrate before whom a proceeding is pending or to whom an application for relief has been made, shall finally determine whether the individual is eligible under this section for the defender's aid. [Formerly 138.770; 1973 c.694 §19]

151.260 Register of proceedings. The defender shall keep a register in which he shall make a note of each proceeding in which he serves in his official capacity. The right to custody of the register passes to the defender's successor in office, and the defender shall deliver the register to his successor in office. [Formerly 138.780]

151.270 Public Defender Committee; appointment; expenses; term. (1) The Supreme Court shall appoint a Public Defender Committee of not fewer than five individuals, who, in the opinion of the court, are qualified by training or experience to perform the func-

tions of the committee. A majority of the committee is a quorum for the transaction of business.

(2) Each member is entitled to compensation and expenses as provided in ORS 292.495.

(3) Each member's term is four years and he may be reappointed. [Formerly 138.720]

151.280 Duties of committee. The committee shall:

(1) Appoint a Public Defender;

(2) Determine policies and procedures for the performance of the defender's functions;

(3) Determine standards of eligibility for the defender and his deputies;

(4) Approve the original estimate sheet in connection with the budget for the defender's office and generally be responsible for supervision of the expenditures made for the defender's office;

(5) Prescribe a form of oath of financial circumstances for use under ORS 151.250 (3);

(6) Prescribe a formula of apportionment of expenses under ORS 137.205 (1969 Replacement Part); and

(7) Where the defender is unable to perform fully his authorized functions, determine the nature and extent of the services he shall render. [Formerly 138.730]

151.290 Public Defender's Account. There hereby is established in the General Fund of the State Treasury an account to be known as the Public Defender's Account. All moneys received by the Public Defender shall be paid into the State Treasury and credited to the Public Defender's Account. All moneys in the Public Defender's Account hereby are appropriated continuously for and, subject to approval by the Public Defender Committee, shall be used by the Public Defender in carrying out the purposes of ORS 138.480 to 138.500, 138.590 and 151.210 to 151.290. [Formerly 138.790]

CHAPTER 152
[Reserved for expansion]